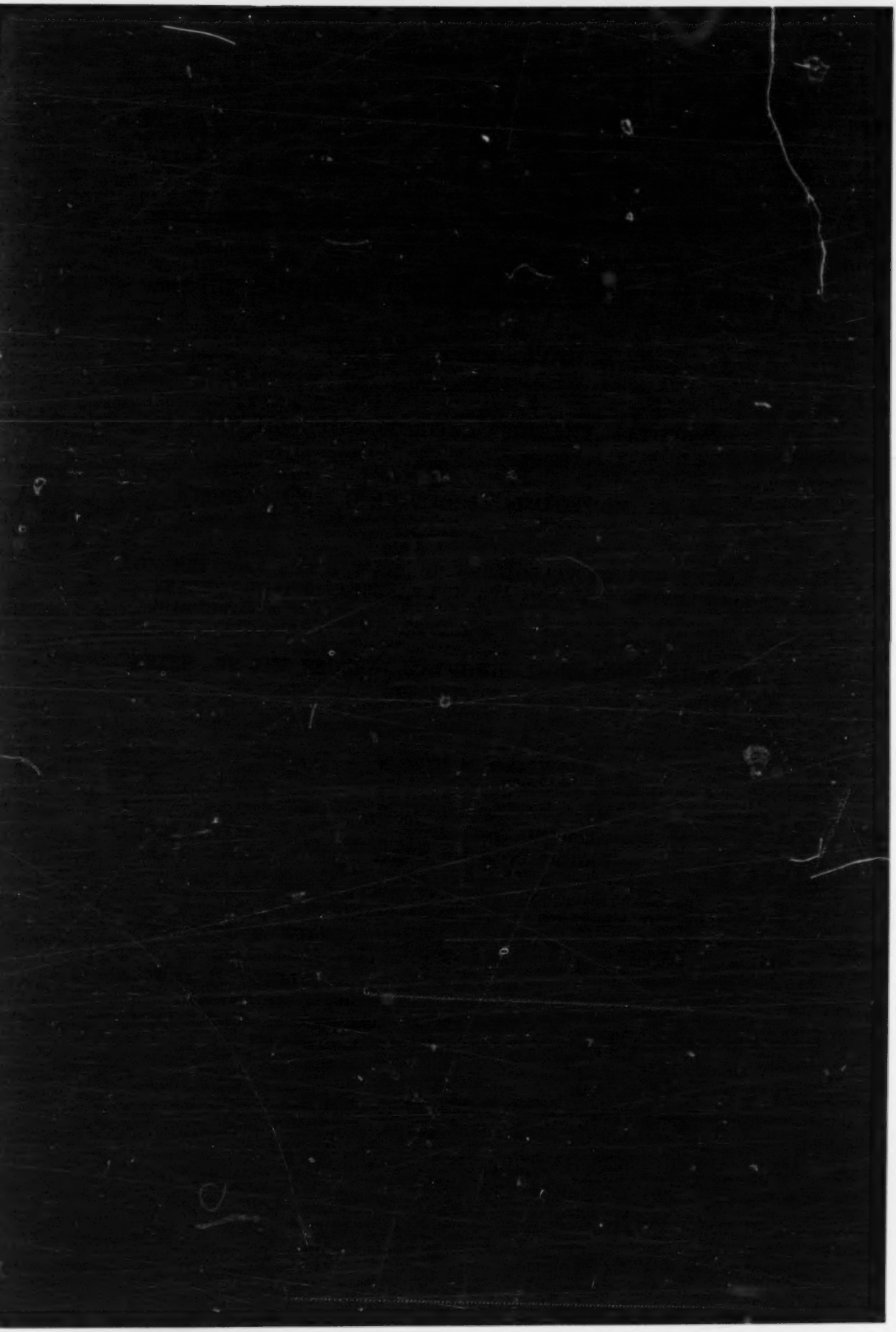

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1719

LAMAR LIFE BROADCASTING COMPANY, PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 23–24) is not officially reported. The opinion of the Federal Communications Commission (Pet. App. 1–22) is reported at 26 F.C.C. 2d 100.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1971 (Pet. App. 23–24), and rehearing was denied on April 30, 1971 (Pet. App. 44). The petition for a writ of certiorari was filed on May 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, which had previously been held to be "at best, a licensee in name only" which must "take its place among competing applicants" (Pet. App. 42), was properly denied interim authority to operate a commercial television station on channel 3, Jackson, Mississippi.

STATUTES INVOLVED

Section 307(d) of the Communications Act of 1934, as amended (47 U.S.C. 307(d)), provides in pertinent part:

> * * * Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses * * * if the Commission finds that public interest, convenience, and necessity would be served thereby. * * * Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. * * *

Section 402(h) of the Communications Act of 1934, as amended (47 U.S.C. 402(h)), provides:

> In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do

so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

STATEMENT

In 1965, the Federal Communications Commission, in lieu of the requested three-year renewal, granted petitioner a one-year "conditional" renewal of its license to operate television station WLBT on channel 3 in Jackson, Mississippi; the probationary renewal was awarded over a petition to deny, filed by various organizations and individuals, which raised questions regarding Lamar's service to the black community and its compliance with the Commission's Fairness Doctrine. *Lamar Life Broadcasting Co.*, 38 F.C.C. 1143. Because the Commission had denied the complainants the right to intervene as parties and because the public interest issue raised by them had been found by the Commission to be so serious as to warrant only a limited probationary renewal, the court of appeals reversed and remanded the case to the Commission with instructions that it hold an evidentiary hearing on Lamar's renewal application. *Office of Communitation of The United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994 (C.A.D.C.). On rehearing, with the participation of the community representatives, the Commission granted Lamar's application to continue operating the station for a new three-year term. *Lamar Life Broadcasting Co.*, 14 F.C.C. 2d 431. The intervenors again appealed.

In 1969, the court of appeals set aside the Commis-

sion's determination a second time, holding that, in view of the Commission's prior finding that petitioner's earlier conduct prevented the grant of a full-term license, the burden was on the petitioner to demonstrate that it was in the public interest for its license to be renewed. Since petitioner failed to meet this burden, the court concluded, "* * * the grant of a license [to Lamar] must be vacated forthwith and the Commission * * * directed to invite [new] applications to be filed for the license." *Office of Communication of The United Church of Christ* v. *Federal Communications Commission*, 425 F. 2d 543, 550 (Pet. App. 38). The court explicitly declined to disqualify Lamar from filing a new application, however, and it directed the Commission (Pet. App. 38):

> * * * to consider a plan for interim operation pending completion of its hearings; if it finds it in the public interest to permit the present licensee to carry on interim operations that alternative is available. The Commission is free to consider whether net earnings of the licensee should be impounded by the Commission pending final disposition of this license application. (Footnote omitted.)

The Commission, seeing a possible conflict between the court's mandate regarding interim operations and Section 307(d) of the Communications Act, petitioned for rehearing, requesting clarification on this point.[1] On September 5, 1969, the petitions for rehearing were denied *per curiam*, 425 F. 2d 550 (Pet. App. 39, 40), but with an accompanying statement by two

[1] Lamar also petitioned for rehearing, on similar grounds.

members of the deciding panel, Judges McGowan and Tamm,[2] further explaining their earlier decision (Pet. App. 41):

> The Commission points to the provision of 47 U.S.C. § 307(d) to the effect that, pending final disposition of a renewal application, the Commission "shall continue such license in effect." It says that this means that the licensee seeking renewal must be regarded as having continuing authority until its application has been finally disposed of adversely to it—and this last, so it is said, only the Commission can do. It is doubtful if Congress intended that a licensee should be able to remain in possession indefinitely merely because the Commission proves unable or unwilling to conduct proceedings which will survive judicial scrutiny. A licensee holding over on any such basis is, at best, a licensee in name only, and it is presumably in such light that the licensee here involved will take its place among competing applicants.

Thereafter, pursuant to the court of appeals' mandate, the Commission vacated the grant of Lamar's renewal application, requested a new application from Lamar, and invited competing applications for the license. A decision as to interim operation of the facility was postponed until such time as all applications were before the Commission. *Lamar Life Broadcasting Co.*, 20 F.C.C. 2d 635. Lamar sought reconsideration, contending that a grant of interim authorization to any other party would violate Lamar's asserted right under Section 307(d) to continue oper-

[2] The third panel member, Judge Burger, had since been appointed Chief Justice of the United States.

ation of the television station pending a final determination on its renewal application. In denying reconsideration, the Commission concluded that, since the court had said one alternative available to it would be to permit Lamar to carry on interim operations, it therefore had "under the mandate of the Court * * * authority to consider various alternatives, and to authorize an interim operator other than Lamar if [it found] that such an alternative would serve the public interest." *Lamar Life Broadcasting Co.*, 21 F.C.C. 2d 277, 279.[3]

Shortly thereafter, the Commission specifically asked for the filing of requests for interim authorizations. *Lamar Life Broadcasting Co.*, 22 F.C.C. 2d 47. Requests were filed by Lamar,[4] by a joint venture con-

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[3] On February 3, 1970, Lamar appealed from the Commission's decision inviting new applications and from its denial of Lamar's reconsideration request. *Lamar Life Broadcasting Co.* v. *Federal Communications Commission*, Case No. 23,920 (C.A.D.C.). This appeal was consolidated by the court below with *Civic Communications Corp.* v. *Federal Communications Commission*, No. 23,953 (C.A.D.C.). The Commission had denied the petition of Civic, a new applicant, to impound Lamar's television profits pending selection of an interim operator, preferring to deal with the issue of interim profits at the time the interim operator was selected. By order of April 14, 1970, the court held proceedings in both appeals in abeyance pending Commission disposition of applications for interim authority.

[4] Lamar had also separately filed with the Commission (1) an updated renewal application (Form 303), and (2) an application for a construction permit for channel 3, filed under protest (Form 301). Competing applications were received from four new applicants for the license. These applications were duly designated for a comparative hearing which is now in process. *Lamar Life Broadcasting Co.*, 25 F.C.C. 2d 101, reconsideration denied, 24 F.C.C. 2d 618.

sisting of three of the applicants for regular authorization, and by Communications Improvement, Inc. ("CII"), a non-applicant and non-profit entity. In September 1970, the Commission determined that a grant to CII would best serve the public interest. *Lamar Life Broadcasting Co.,* 26 F.C.C. 2d 100 (Pet. App. 1). This decision was based primarily on the fact that (Pet. App. 15–16):

> * * * [CII's] proposal avoids any possible prejudice to the applicants whose mutually exclusive applications have been designated for hearing, and is in keeping with the principles enunciated in *Community Broadcasting Co., Inc.* v. *F.C.C.,* 274 F.2d 753, 19 R.R. 2047 (1960). [Footnote omitted.] The lack of prejudice is of controlling comparative significance and outweighs all other comparative factors, see *Oak Knoll Broadcasting Corp.,* [2 Pike & Fischer, R.R. 2d 1011 (1964)].[5]

Thus, the Commission terminated Lamar's operating authority and made the grant to CII effective 30 days from the release date of the order (Pet. App. 19).

Lamar appealed to the court of appeals (Case No. 24,613), and at the same time sought a stay from the Commission of the termination of its operating authority pending the outcome of the appeal. The Commission denied this stay request on September 16, 1970. *Lamar Life Broadcasting Co.,* 25 F.C.C. 2d 619. La-

[5] The profits from CII's operation will be devoted to nonprofit, educational functions related to broadcasting in the State of Mississippi. This, plus the inherent weaknesses of a joint interim operation made up of applicants for regular authority, also weighed in CII's favor (Pet. App. 16).

mar thereupon asked the court of appeals for a stay pending appeal and for an immediate decision on the merits.

On March 17, 1971, the court of appeals granted Lamar's motion for immediate decision and affirmed the Commission's decision terminating Lamar's operating authority and granting interim authority to CII; it dismissed the stay application as moot (Pet. App. 23). A petition for rehearing and rehearing *en banc* was denied on April 30, 1971 (Pet. App. 43–44); on May 14, 1971, the court stayed its mandate until May 30, 1971, pending the filing of a petition for a writ of certiorari (Pet. App. 45).[6]

ARGUMENT

The petition presents no question of general importance; it arises out of a *sui generis* proceeding that has been under the continuous supervision of the court below since 1965. The particular decision challenged in this petition holds only that the Commission acted within the terms of the court's earlier mandate when it ordered the termination of Lamar's operating authority.

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[6] Meanwhile CII had requested an order from the Commission to take Lamar off the air and impound its profits since September 8, 1970, the date of the grant of interim authority to CII. The Commission, deciding that the date when Lamar's operating authority came to an end was April 17, 1971, 30 days after the court of appeals' decision, impounded profits as of that date. *Communications Improvements, Inc.*, F.C.C. 71–543, released May 21, 1971, reprinted as Appendix A, *infra*. Lamar again appealed, and, on June 4, 1971, the court of appeals ruled that its May 14 stay of mandate did not constitute a "stay on the transfer of operating authority for the station * * *" (Pet. Supp. Br. App. 9).

Petitioner premises its entire argument on Section 307(d) of the Communications Act and Section 9(b) of the Administrative Procedure Act (5 U.S.C. (Supp. V) 558(c)) both of which require that an applicant for license renewal be permitted to continue operating until a final decision is reached on its renewal application. Those statutory provisions, however, cannot avail petitioner in the circumstances of this case. Here, a final decision was reached on petitioner's renewal application almost two years ago by the court of appeals. *Office of Communication of The United Church of Christ* v. *Federal Communications Commission,* 425 F. 2d 543 (C.A.D.C.), rehearing denied, 425 F. 2d 550 (C.A.D.C.).

There, the court, in ordering the Commission to vacate its earlier grant of petitioner's renewal application, held that the administrative record was in such condition that rehearing or reconsideration by the Commission would "serve no useful purpose" (Pet. App. 38). Accordingly, it terminated the license *renewal* aspect of the proceedings and ordered the Commission to invite new applicants to compete for petitioner's license; petitioner was not to be disqualified from filing a new application, but it had to compete on an equal footing with the others. In short, petitioner had lost its special status of renewal applicant.

That ruling was never challenged in this Court;[7] petitioner's belated attempt to seek review of it

[7] Petitioner's sole explanation for not then petitioning this Court for a writ of certiorari is that it thought that the court of appeals "had recognized its right to continue operating as a hold-over licensee" (Pet. 5 n. 10). There is, however, nothing in the court's original opinion (Pet. App. 25–38), or in its

now is obviously prejudicial to the competing applicants and to the Commission. Petitioner has filed a new application which is now pending before the Commission (*supra* n. 4); its *renewal* application is no longer under consideration. Thus, as fully explained by the court of appeals in denying the earlier petition for rehearing (Pet. App. 42), to the extent that petitioner can now be considered the licensee, it is, "at best, a licensee in name only." Its position before the Commission is now no different than that of any other applicant for the facility. In these special circumstances, the statutory provisions on which petitioner relies do not apply.

In any event, the court of appeals did not err in directing the Commission to entertain only new applications for the license. Under Section 402(h) of the Communications Act (47 U.S.C. 402(h)), the court had authority appropriately to direct the course of further proceedings in its order reversing the Commission's decision.[8] In light of the facts that the petitioner had repeatedly failed to establish its claim to renewal, that two renewal grants in six years had been vacated by the court, and that there were serious deficiencies in the Commission's record, the determination to begin the application process anew, with

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supplemental statement accompanying the denial of the petition for rehearing (Pet. App. 40–42), which suggests such recognition. The clear import of the court's rulings was exactly the opposite.

[8] Section 402(h) was "intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal, requiring the Commission to give effect to the judgment of the Court * * *." Senate Rept. No. 44, 82d Cong., 1st Sess., p. 12.

petitoner no longer in the role of the typical renewal applicant but rather competing on an equal basis with newcomers, was entirely appropriate. Cf. *WORZ, Inc.* v. *Federal Communications Commission,* 345 F. 2d 85; *Jacksonville Broadcasting Corp.* v. *Federal Communications Commission,* 348 F. 2d 75, certiorari denied, 382 U.S. 893; *Greater Boston Television Corp.* v. *Federal Communications Commission,* Case Nos. 17,785 et al. C.A.D.C., decided November 13, 1970, petition for certiorari pending.[9]

It is therefore clear that the extraordinary history of this proceeding warranted the court's holding that

[9] Contrary to petitioner's contention (Pet. 10–11, n. 14), there is no conflict between this case and *Consolidated Nine, Inc.* v. *Federal Communications Commission*, 403 F. 2d 585 (C.A.D.C.). In that case, a new comparative hearing had been ordered, and the Commission left the existing operator on the air in the interim even though his original grant of regular authority had been twice judicially voided. In overturning the Commission, the court of appeals concluded that, on the facts there presented, the situation fell somewhere between a valid license up for renewal and a comparative proceeding for a new facility, but that it was closer to the latter. Thus, the court held that the existing operator could not have the interim authority because of the considerations first laid down in *Community Broadcasting Co.* v. *Federal Communications Commission*, 274 F. 2d 753 (C.A.D.C.). *Consolidated Nine* is, therefore, quite similar to the instant situation, where the court has twice voided the Commission's renewal grants and has ordered a *new* comparative hearing. That *Consolidated Nine* involved an original grant, while renewal grants were at issue in the proceedings here, is a technical distinction without practical difference. The same can be said about the fact that the court did not, in its initial order prohibit Lamar from being the interim operator, as it had done in *Consolidated Nine*; in the instant case it left the choice to the Commission and, in its order of March 17, 1971, affirmed that choice.

petitioner was no longer a renewal applicant for purposes of Section 307(d). Accordingly, the subsequent grant by the Commission of interim operating authority to CII, as the most effective way to "place all applicants on an equal footing in the comparative hearing" (Pet. App. 17), in no way interfered with petitioner's rights; it was entirely consistent with the court of appeals' mandate (Pet. App. 3–6).[10]

Nor is there merit in petitioner's contention that the Commission has treated its renewal application as still pending. In the order designating petitioner and the other four applicants for a comparative hearing, the Commission made it clear that while petitioner's renewal application was *technically* to be held in abeyance, its fate would depend on the result of the comparative hearing where petitioner is to be "judged on its basic [new] application." 25 F.C.C. 2d at 101. And again, in a recent order declining to add the former renewal issues to the comparative proceeding, the Commission recognized expressly that the court intended "that consideration of the renewal be terminated." F.C.C. 71–379, released April 21, 1971, App. B, *infra*.

[10] Nor can the Commission be faulted for proceeding to implement its order designating CII as interim operator (*supra* n. 6). Contrary to petitioner's argument in its Supplemental Brief, the court below has not issued a stay of the Commission's order, or its affirmance thereof, but has merely stayed its mandate pending the filing of a petition for certiorari in this Court (Pet. Supp. Br. App. 9).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1971.

APPENDIX A

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

(FCC 71-543, 62964; File No. BPCTI-11)

IN THE MATTER OF COMMUNICATION IMPROVEMENTS, INC., JACKSON, MISS.

(Motion to discontinue operation and to impound profits)

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1971; Released: May 21, 1971.

By the Commission: Commissioners Bartley and Robert E. Lee absent. Commissioner Johnson concurring in part and dissenting in part.

1. Now under consideration are: (a) a motion filed April 20, 1971, by Communications Improvement, Inc. (CII), grantee of an interim authorization to operate a commercial television broadcast station on channel 3, Jackson, Mississippi, seeking an order from the Commission that would (1) require Lamar Life Broadcasting Company (Lamar) to discontinue operation of television broadcast station WLBT, channel 3, Jackson, Mississippi, (2) impound the profits generated by the station since September 8, 1970, and (3) in the alternative give a declaratory ruling that our stay of the effective date of the grant of interim authority to CII expired on April 17, 1971; and (b)

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an opposition to the motion filed April 26, 1971, by Lamar.[1]

2. CII's motion arises out of the following events. In *Lamar Life Broadcasting Company,* 25 FCC 2d 101, released May 4, 1970, we designated for comparative hearing five competing applications for a construction permit to operate a commercial television station on channel 3, Jackson, Mississippi. Subsequently, we granted interim authority to CII to operate station WLBT(TV) pending the outcome of a final determination on the applications in hearing, *Lamar Life Broadcasting Company,* 26 FCC 2d 100, 20 RR 2d 167, released September 8, 1970. In *Lamar Life Broadcasting Company,* 25 FCC 2d 619, released September 16, 1971, we denied Lamar's petition for stay pending judicial review. We did order, however, that:

> * * * if Lamar Life Broadcasting Company notifies the Commission within two (2) days of the release date of this Order that it intends to seek a stay from the United States Court of Appeals for the District of Columbia Circuit and seeks such a stay within seven (7) days of the release date of this Order, our Memorandum Opinion and Order, *Lamar Life Broadcasting Company,* FCC 70–957, released September 8, 1970, IS STAYED until thirty (30) days after the Court acts on Lamar Life Broadcasting Company's motion for stay. (25 FCC 2d at 620).

Lamar seasonably filed a motion for stay with the Court and thereby came within the terms of the

[1] We consider CII's motion to be one for temporary relief under section 1.45(d) of our rules. Under that rule, no reply pleadings are permitted. We therefore deny CII's motion to accept a reply pleading filed May 3, 1971. We also deny Lamar's motion to file a supplemental pleading, filed May 3, 1971, to respond to CII's reply.

quoted language. On March 17, 1971, the Court issued a *per curiam* order (Case No. 24,613) upholding our September 8th decision on the merits and dismissed as moot related motions, including Lamar's motion for stay pending appeal. On March 30, 1971, Lamar filed with the Court a petition for rehearing of the *per curiam* order and suggested a rehearing *en banc*. The Court denied that petition on April 30, 1971. On May 14, 1971, the Court granted Lamar's motion to stay mandate until May 30, 1971.

3. Lamar takes the position that an opinion of the Court of Appeals is not self-executing[2] and that it takes the issuance of a mandate for the Court to "act."[3] Pending court action, according to Lamar, the Commission may preserve the *status quo,* but may not decide substantive rights that are the subject of the appeal.[4] Since the Court has stayed its mandate, and since Lamar has petitioned for a writ of certiorari from the Supreme Court which automatically stays the issuance of a mandate under Rule 41 of the Federal Rules of Appellate Procedure, Lamar concludes that the Court has not "acted." Thus, Lamar asserts, the stay of the effective date of the grant of interim authority to CII is still in effect under the terms of the Commission's Memorandum Opinion and Order to September 16, 1970, which is cited and, in part, quoted above. Since the stay and the merits of the case both go to the issue of whether Lamar is to continue operation of station WLBT(TV), Lamar also contends that a grant of CII's motion would not preserve the

[2] Citing *Petition of Buscaglia*, 145 F. 2d 428 (1st Cir. 1944).

[3] Citing *Merrimack River Savings Bank* v. *Clay*, 219 U.S. 527, 31 S. Ct. 295 (1911); *Gill* v. *Commissioner of Internal Revenue*, 306 F. 2d 902 (3rd Cir. 1962); and *Bailey* v. *Henslee*, 309 F. 2d 840 (8th Cir. 1962).

[4] Citing *Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 42 S. Ct. 264 (1922).

status quo but would decide the substantive issue before the Court. Lamar urges, therefore, that the stay should remain in effect to preserve the *status quo* so as not to "oust the Court of its jurisdiction."

4. CII takes the position that the Commission expressly denied a petition for stay pending judicial review on the merits. The Commission's stay, CII argues, was only to afford Lamar an opportunity to seek a stay from the Court. The Court has now issued a decision on the merits and dismissed the motion for stay as moot. CII contends that if the Commission's stay order is interpreted, as Lamar does, to require the issuance of a mandate ". . . the effect would be that Lamar would obtain under paragraph 4 (quoted above) of the Commission's stay order the very relief which the Commission expressly denied * * *"

5. In our decision of September 16, 1970, we denied Lamar's request for a stay pending judicial review of the entire proceeding. Instead, we granted a stay solely to afford the Court the opportunity to pass on a motion for stay to be filed by Lamar. Lamar would read our decision as granting, rather than denying, its motion for stay pending judicial review. It is true, of course, that a court technically acts on the merits by issuing a mandate. However, a mandate is not issued as to orders disposing of motions for stay. Thus, the Court "acts" on a motion for stay by issuing its order. In this case this was done by the Court's order of March 17, 1971, in Case No. 24,613. We had anticipated that the Court would have acted on the motion for stay prior to a decision on the merits. We do not believe, however, that a different result obtains because the Court issued a decision on the merits and, in the same document, dismissed as moot the motion for stay. We are of the view, therefore, that the Court

has acted and that our stay has dissolved by its own terms.[5] Accordingly, we hold that the grant of interim authority to CII was effective at 3:00 a.m., April 17, 1971. As will be seen below, if Lamar wishes to seek a judicial stay of our action, there will be time to file an appropriate petition.

6. Lamar nevertheless continues to operate station WLBT(TV) based on its interpretation of when the Court "acts." This brings us to the question of the disposition of profits resulting from Lamar's continued operation of the station. CII urges that we impound profits from September 8, 1970, the date of release of our Memorandum Opinion and Order granting CII's application for interim authority. However, having once declined to impound profits, *Lamar Life Broadcasting Company*, 21 FCC 2d 277, 18 RR 2d 274 (1970), we agree with Lamar that impounding of profits as of that date would be unconscionable. We do believe that it is appropriate, in these circumstances, to impound profits as of the effective date of the grant of interim authority; that is, April 17, 1971. In this manner, we shall continue the station's service to Jackson, but shall not permit Lamar to profit by its continued operation. We expect the profits to be deposited in an escrow account at a financial institution that is mutually acceptable to CII and Lamar. In determining profits, we shall require Lamar to use the accounting practices and procedures it now uses

[5] In our opposition to Lamar's motion to stay mandate, we advised the Court that this was our interpretation and that, unless the Court expressly directed otherwise, the Commission would feel free to reach a decision on the motion now under consideration. Lamar, responding to that pleading, urged that any order staying the mandate should make clear that the effective date of our grant of interim authority to CII is also to be stayed. The Court considered those pleadings but declined to add the language suggested by Lamar.

for Federal income tax purposes. We shall also require that Lamar provide us and/or CII with an accounting at such intervals as we may deem appropriate.

7. There is good reason for permitting Lamar to continue operation of station WLBT(TV) for a brief period, since CII is not in a position to take over operation of the station. It has not filed a license application, a request for program test authority, or a request for a call sign. In addition, Lamar alleges that a loan to CII from the United Methodist Church, upon which we relied in finding CII financially qualified, has not been reduced to final form. Accordingly, CII should submit as soon as possible a license application, appropriate requests for program test authority and for a call sign, and an executed copy of an appropriate loan agreement for $300,000.

8. After CII files all the material requested above, we believe that it is appropriate to permit the parties a further ten-day period to complete their negotiations as to employees, the leasing of facilities, and other aspects of the transfer. Although both Lamar and CII allege that, to date, the other has not been negotiating as expeditiously as it might, we do not believe that a significant question as to a lack of good faith has been raised. We expect good faith bargaining will result in a satisfactory agreement within the further ten-day period specified above. Upon the execution of a satisfactory agreement between Lamar and CII, any funds in the escrow account will be turned over to CII for distribution in accordance with its representations to us.

9. Accordingly, IT IS ORDERED that, to the extent indicated above, the Motion of Communications Improvement, Inc., *IS GRANTED,* and in all other respects IS DENIED.

10. IT IS FURTHER ORDERED that Lamar Life Broadcasting Company WILL PLACE IN ESCROW all profits generated by the operation of station WLBT(TV) after 3:00 a.m., April 17, 1971, in a financial institution that is mutually acceptable to Lamar Life Broadcasting Company and Communications Improvement, Inc.

11. IT IS FURTHER ORDERED that "profits" shall be determined by the accounting practices and procedures used by Lamar Life Broadcasting Company for Federal income tax purposes.

12. IT IS FURTHER ORDERED that Lamar Life Broadcasting Company shall submit an accounting of profits to the Commission and/or Communications Improvement, Inc., at the Commission's request at such intervals as we may deem appropriate.

13. IT IS FURTHER ORDERED that Communications Improvement, Inc., SHALL SUBMIT a license application; appropriate requests for program test authority and for a call sign; and an executed copy of an appropriate loan agreement for $300,000.

14. IT IS FURTHER ORDERED that when Communications Improvement, Inc., complies with all the requirements of paragraph 13, above, Lamar Life Broadcasting Company and Communications Improvement, Inc., shall have an additional ten (10) days from that date to reach an agreement as to the transfer of operation of station WLBT(TV) to Communications Improvement, Inc., and, upon the execution of that agreement, any funds in the escrow account SHALL BE PAID to Communications Improvement, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX B

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

IN RE APPLICATIONS OF LAMAR LIFE BROADCASTING COMPANY, JACKSON, MISSISSIPPI

Docket No. 18845, File Nos. BPCT-4320, BRCT-326

CIVIC COMMUNICATIONS CORPORATION, JACKSON, MISSISSIPPI

Docket No. 18846, File No. BPCT-4305

DIXIE NATIONAL BROADCASTING CORPORATION, JACKSON, MISSISSIPPI

Docket No. 18847, File No. BPCT-4317

JACKSON TELEVISION, INC., JACKSON, MISSISSIPPI

Docket No. 18848, File No. BPCT-4318

CHANNEL 3, INC., JACKSON, MISSISSIPPI

Docket No. 18849, File No. BPCT-4319

(For a Construction Permit)

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1971; Released: April 21, 1971.

By the Commission: Commissioners Johnson and Houser dissenting.

1. The Commission has before it for consideration: (a) the Review Board's Memorandum Opinion and Order, FCC 70R–456, 26 FCC 2d 940, released December 31, 1970; (b) an application for review of the Board's order, *supra,* filed by Lamar Life Broadcasting Company on January 8, 1971; (c) opposition to the application for review filed by Civic Communications Corporation on January 15, 1971; (d) comments of the Broadcast Bureau filed on January 20, 1971; and (e) a reply to the opposition and comments filed by Lamar Life Broadcasting Company on January 21, 1971.

2. A statement of the pertinent background of this proceeding is set forth in our Memorandum Opinion and Order, FCC 70–817, 24 FCC 2d 618, denying reconsideration of the designation order (25 FCC 2d 101 (1970)) and need not be repeated herein.

3. On May 22, 1970, Civic Communications Corporation (Civic) filed with the Review Board a petition seeking, *inter alia,* enlargement of issues against Lamar Life Broadcasting Company (Lamar) to determine the effect upon Lamar's basic qualifications of charges that in the years 1961–1964 Lamar's programming had been unfair to various groups, particularly Negro groups, and that Lamar had discriminatorily denied such groups the opportunity for local expression over its facilities. Issues similar to those requested by Civic were specified in the Commission's 1966 order[1] designating Lamar's renewal application (BRCT–326) for hearing, except that the issues were not specifically limited to the 1961–1964 period. The Board considered that it was free under *Atlantic Broadcasting Company* (*WUST*), 5 FCC 2d 717 (1966), to reach the merits of Civic's petition to enlarge issues because it believed that the question

[1] *Lamar Life Broadcasting Co.*, 3 FCC 2d 784 (1966).

of the issues previously specified against Lamar had not been specifically considered in the Commission's designation order herein and in its order denying reconsideration thereof. The Board therefore held that it was appropriate to specify the issues requested by Civic, and, further that the matters involved are relevant to Lamar's qualifications to receive a construction permit. The Board stated that it was persuaded to add the issues essentially because it read the Court of Appeals's decision in *Office of Comunication of the United Church of Christ* v. *F.C.C.*, —— U.S. App. D.C. ——, 425 F. 2d 543 (1969), as holding that the renewal application of Lamar was unfinished business which remained to be resolved. The Board found "an apparent anomaly which could result if Lamar were ultimately to be preferred in this proceeding and the Commission were required to rule on the accompanying renewal application without the benefit of a record under the same qualifying issues which were specified earlier." (Footnote omitted.)

4. We believe that the Review Board has incorrectly appraised the present status of Lamar and the Lamar renewal application. As we read the Court's opinions, the Court did not intend that we re-try the Lamar renewal case, something the Court could readily have decreed if it believed such a course appropriate, but rather that consideration of the renewal be terminated and new applications for the channel be accepted, including a new application by Lamar if the Commission should so permit. It was made clear by the Court that Lamar was to be a renewal applicant "in name only" and that all new applicants, including Lamar, were to be treated as starting fresh with no advantage to Lamar because of its previous use of the channel. It was in the light of this situation

that we did not reinstate the former renewal issues, and that we specified the treatment to be given Lamar's past occupancy of the channel. We thus stated in the order of designation that the grant or denial of the pending renewal application (BRCT-326) for station WLBT would rest upon the determination made in this hearing with respect to Lamar's new application for a construction permit (BPCT-4320).[2] We further held that we did not think it reasonable or proper to re-try the renewal issue to permit Lamar to make a new attempt to show that it should be given a preference for above average performance. We see no need here to restate the full treatment we gave these matters in our earlier opinions. But we think it clear that inserting the former renewal issues into this matter would be inconsistent with both the Court's mandate and our own rulings subsequent to that mandate. To do so would improperly put Lamar back in the position of a renewal applicant fighting off new challengers. We find that the Review Board's order is inconsistent with the procedures which we have prescribed. In view of the consideration which we have given to these matters in our previous orders, we hold that the Board erred to the extent that it granted Civic's petition to enlarge issues and added qualifying issues against Lamar.

5. ACCORDINGLY, IT IS ORDERED That the application for review filed by Lamar Life Broadcasting Company on January 8, 1971, IS GRANTED to the extent indicated herein.

6. IT IS FURTHER ORDERED That the Review Board's Memorandum Opinion and Order, FCC

[2] This language must be read in the light of the Court's statement that Lamar is "a licensee in name only, and it is presumably in such light that . . . [Lamar] will take its place among competing applicants."

70R–456, 26 FCC 2d 940, released December 31, 1970, insofar as the Board granted a petition to enlarge issues filed by Civic Communications Corporation on May 22, 1970, and added issues against Lamar Life Broadcasting Company, IS SET ASIDE.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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